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No. 79-1334

In the Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS E. HAYDEN AND JANE S. FONDA, PETITIONERS

v.

NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE, ET AL.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 608 F. 2d 1381. The opinion of the district court (Pet. App. 23a-40a) is reported at 452 F. Supp. 247.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1979. A petition for rehearing was denied on January 9, 1980 (Pet. App. 20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly sustained the National Security Agency's claim of exemption for classified information sought to be disclosed under the Freedom of Information Act.

STATEMENT

Pursuant to the Freedom of Information Act (FOIA), petitioners sought release by the National Security Agency (NSA) of all information pertaining to them. NSA acknowledged that it had classified foreign intelligence reports which made reference to petitioners, but it declined to release them on the ground that they were properly classified under Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Compilation),[1] and were therefore exempt under Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1).[2] In addition, NSA claimed that the material was covered by Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3),[3] which allows the withholding of matters that are specifically exempted from disclosure under other statutes. NSA relied on three such statutes: 50 U.S.C. 403(d)(3), 18 U.S.C. 798, and Pub. L. No. 86-36, Section 6, 73 Stat. 64.[4] Following unsuccessful administrative appeals,

[1]Exec. Order No. 11652 was superseded by Exec. Order No. 12065, 3 C.F.R. 190 (1978 Compilation), effective December 1, 1978. The new Executive Order made no changes in the classification categories involved here, "Secret" and "Top Secret."

[2]5 U.S.C. 552(b)(1) exempts from the FOIA's disclosure provisions "matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; * * *."

[3]5 U.S.C. 552(b)(3) provides that the disclosure provisions of the FOIA do not apply to matters that are "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; * * *."

[4]Section 6(a) of Pub. L. No. 86-36, 73 Stat. 64, provides: "Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any

petitioners filed suit in the United States District Court for the District of Columbia seeking disclosure of all or segregable non-exempt portions of the materials in question.

The district court found NSA's public affidavits in support of withholding insufficiently detailed to sustain the agency's action, but the court subsequently accepted, in camera, a 20-page "Top Secret" affidavit explaining the basis for the agency's withholding of the information. On the basis of that affidavit, coupled with the public record, the district court sustained NSA's Exemption 1 claim. NSA did not assert, and the district court did not hold, that the material was exempt from disclosure because of the substantive information it contained (Pet. App. 26a). Instead, in concluding that the documents were properly classified in their entirety, the district court found that "disclosure would reveal the means by which the information was acquired, thereby revealing intelligence sources and methods, and the manner in which NSA functions" (*ibid.*). As an alternative basis for withholding, the court upheld NSA's Exemption 3 claim based on Section 6 of Pub. L. No. 86-36, 73 Stat. 64, finding that

function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." The exception in subsection (b) pertains to certain reports submitted to Congress pursuant to 10 U.S.C. 1582 and therefore has no bearing on this case.

In light of their construction of Pub. L. No. 86-36, 73 Stat. 63, the courts below did not consider the applicability of 50 U.S.C. 403(d)(3) and 18 U.S.C. 798 (see Pet. App. 15a n.44). The former provides that the Director of Central Intelligence shall be responsible "for protecting intelligence sources and methods from unauthorized disclosure," and the latter provides criminal penalties for the unauthorized release or use of classified information relating to communication intelligence activities.

withholding was necessary to protect intelligence sources, methods, and activities and "information with respect to the activities" of NSA under that provision (Pet. App. 34a-37a).

The court of appeals affirmed in a comprehensive decision (Pet. App. 1a-19a). After analyzing the appropriate guidelines and standards for judicial review, the court held that the district court had developed the most complete public record possible given NSA's "peculiar circumstances" (Pet. App. 6a). In the court's view, public disclosure of any meaningful substantive information might enable an informed person to "identify the communications intercepted by NSA, such as information about date, time, origin, or manner of transmission or receipt" and thus to discern "which channels or types of communication are being monitored by NSA" (*ibid.*). With respect to Exemption 1, based on the public and in camera record, the court of appeals held that NSA had met its burden of showing that it had followed proper classification procedures and that, by the agency's description of the requested information, the material "logically falls" within the claimed exemption (Pet. App. 10a, citing *Weissman* v. *CIA*, 565 F. 2d 692, 697 (D.C. Cir. 1977)). In determining the sufficiency of the agency's description of the material and the basis for withholding it, the court recognized Congress' intent that courts accord "substantial weight" to the agency's affidavits justifying withholding (Pet. App. 4a, 11a, quoting S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974)).

The court of appeals also sustained NSA's independent basis for withholding the requested material under Exemption 3 of the FOIA and Section 6 of Pub. L. No. 86-36, 73 Stat. 64. The court found (Pet. App. 15a) that Section 6 satisfies the requirements of an Exemption 3

statute, because it clearly "refers to particular types of matters to be withheld" within the meaning of Exemption 3—*i.e.*, "the organization or any function of the National Security Agency, * * * any information with respect to the activities thereof, or * * * the names, titles, salaries, or number of the persons employed by such agency." The court remarked that "[t]he public record in this case, even without the *in camera* affidavit, demonstrates that release of the documents would disclose a function of the NSA, since signals intelligence is one of the Agency's primary functions; and would disclose information with respect to Agency activities, since any information about an intercepted communication concerns an NSA activity" (Pet. App. 16a). Accordingly, the court held that NSA had satisfied its burden under Exemption 3 by describing the "intelligence activity involved and why disclosure of the requested materials could reveal the nature of that activity" (*id.* at 18a).

ARGUMENT

The judgment of the court of appeals may be sustained on the basis of either its Exemption 1 or its Exemption 3 holding. But the court of appeals' decision is clearly correct as to both alternatives, and there is no conflict among the circuits. Accordingly, further review is unwarranted.

1. *Exemption 1*

(a) In challenging the court of appeals' conclusion that the materials were properly classified, petitioners err in focusing on the non-sensitive *content* of these documents (Pet. 13). Both courts below correctly recognized that

classification here is necessary, not to protect content, but to protect intelligence sources and methods.[5]

NSA supplies intelligence information to policy makers at the highest levels of government, pursuant to requirements of the intelligence community. The fact that particular channels were surveilled by NSA at a particular time reflects the specific concerns of government policy makers. Identifying sources and methods pertaining to particular information, therefore, might well affect the government's ability to conduct effective foreign policy. In addition, knowledge of the types and channels of communication of interest to our government would permit targets of NSA surveillance to thwart the NSA's ability to gather intelligence information. The courts below properly held that the damage to national security and foreign relations that could reasonably be caused by

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[5]Contrary to petitioners' representations (Pet. 2, 9, 13), NSA has never publicly conceded that the communications at issue were sent without encryption or other protection or were transmitted over commercial communications networks. While the content is classified only to protect intelligence sources and methods, it is not possible to describe the communications or to summarize or excerpt their contents understandably without identifying the particular communications.

Petitioners apparently rely on a statement in the government's brief in the court of appeals (Br. 16) that "[f]oreign targets do not generally act on the assumption that their communications are being intercepted, even when transmitted in unencrypted form over international commercial carriers." The brief further notes (*ibid.*) that foreign targets "are observed generally to be acting on the apparent assumption that their communications are not intercepted, probably because they are aware of the disproportion between the total volume of communications and NSA's limited ability to deal with them." These general statements obviously do not concede that the particular communications involved in this case were sent in unencrypted form over commercial networks.

the disclosure that particular communications had been monitored fully justified the classification of the reported information, without regard to the sensitivity of the information itself (Pet. App. 12a, 26a).

(b) Petitioners' reliance on public sources purporting to reveal some of NSA's intercept capabilities (Pet. 16-17) is equally misplaced. First, there is no basis in the record for judging the accuracy of what may be nothing more than speculation as to NSA's activities and capabilities. Second, even if it is assumed that the public is aware of NSA's capabilities in some respects and that those capabilities have some relation to the communications at issue here (but see note 5, *supra*), this would in no way diminish the harm that would flow from revelation that a specific communications circuit was of interest to NSA at a particular point in time.

(c) Petitioners are incorrect in their assertion (Pet. 17) that the court of appeals employed an erroneous standard of review. The court's opinion expressly acknowledges that judicial review under the FOIA is de novo and that the reviewing court must be satisfied that the document, by its sufficient description, "logically falls within the claimed exemption" (Pet. App. 10a; see *Weissman* v. *CIA*, 565 F. 2d 692, 697 (D.C. Cir. 1977); *Ray* v. *Turner*, 587 F. 2d 1187 (D.C. Cir. 1978)). The court correctly held that the agency's affidavits must contain information specific enough to place the documents within the exempted category and that "if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents" (Pet. App. 10a-11a). This approach, the court noted (*id.* at 11a), is consistent "with congressional intent that courts give

agency affidavits 'substantial weight,' in recognition of the agency's expertise." See S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974).

The court's conclusion, with which petitioners take issue (Pet. 17), that it must have a "reasonable basis for finding potential harm from disclosure" (Pet. App. 12a) was simply a reference to the explict classification standards of Exec. Order No. 11652, which were retained unchanged in the superseding Exec. Order No. 12065. Those standards authorize "Top Secret" classification if disclosure of information "could reasonably be expected to cause exceptionally grave damage to the national security" and authorize "Secret" classification if disclosure "could reasonably be expected to cause serious damage to the national security." See note 1, *supra*. Accordingly, as the court of appeals recognized, a court engaged in de novo review to decide whether information is "properly classified" under the Executive Order and therefore exempt from disclosure under Exemption 1 must determine whether grave or serious damage to the national security "could reasonably be expected" to result from disclosure. The "reasonableness" element in judicial review therefore necessarily follows from Congress' decision, embodied in Exemption 1, to allow the Executive to establish the substantive standards for classification. In addition, of course, the court must determine that proper procedures have been applied in classifying the material and that the agency has described the material sufficiently to enable the reviewing court to make a responsible de novo decision. The courts below correctly held that NSA had met its burden.

2. *Exemption 3*

Petitioners' challenge (Pet. 18-19) to the court of appeals' alternative ruling that the material was properly withheld under Exemption 3 is frivolous (see Pet. App. 15a-19a). The legislative history makes clear that it was the unique and highly sensitive activities of NSA, requiring strict security measures, that impelled Congress to enact Section 6 of Pub. L. No. 86-36, 73 Stat. 64, exempting from disclosure "the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." See H.R. Rep. No. 231, 86th Cong., 1st Sess. 6 (1959). Functions and activities of NSA covered by this provision are "particular types of matters to be withheld" within the meaning of Exemption 3(B), and it is well established that Pub. L. No. 86-36, 73 Stat. 63, is an Exemption 3 statute. *Founding Church of Scientology* v. *NSA*, 610 F. 2d 824 (D.C. Cir. 1979); *Serbian Eastern Orthodox Diocese* v. *NSA*, Civ. Action No. 78-03 (D.D.C. July 13, 1978); *Baez* v. *NSA*, Civ. Action No. 76-1921 (D.D.C. Apr. 7, 1978); *Kruh* v. *GSA*, 421 F. Supp. 965 (E.D.N.Y. 1976).

The court of appeals correctly found that "[t]he public record in this case, even without the *in camera* affidavit, demonstrates that release of the documents would disclose a function of the NSA, since signals intelligence is one of the Agency's primary functions; and would disclose information with respect to Agency activities, since any information about an intercepted communication concerns an NSA activity" (Pet. App. 16a). Although petitioners assert that a "function" or "activities" of NSA might include such things as the agency's hiring practices or lobbying activities (Pet. 19), that contention does not

negate the fact that these terms clearly include the communications surveillance that would be revealed by the documents at issue here. Whatever else is encompassed by the secrecy requirement in Pub. L. No. 86-36, the core responsibility of the agency to collect intelligence information by interception of communications channels must surely be covered.[8]

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[8]Petitioners belatedly contend (Pet. 14-15) that NSA's affidavits are not based on personal knowledge, as they say is required by Fed. R. Civ. P. 54(e). Actually the citation should be to Fed. R. Civ. P. 56(e). In any event, that argument was not raised in the courts below and should not be considered by this Court.

Moreover, the particular affidavit to which petitioners apparently refer was not filed in connection with the instant case, but was instead filed in *Baez* v. *NSA*, Civ. Action No. 76-1921 (D.D.C. Apr. 7, 1978), and appended by petitioners to their reply brief in the court of appeals in this case (Reply Br. Addendum 1-5). That affidavit contains general statements, almost identical to those contained in the government's brief in the court of appeals (quoted at note 5, *supra*), that foreign targets assume their communications are not intercepted "probably" because they are aware that NSA can intercept but a small fraction of communications. A defect in an affidavit filed in another case, if there was a defect, obviously is not a basis for reversal here.

The affidavits in the present case contain the expert opinion of an intelligence officer equipped by his special knowledge and experience to assess the adverse consequences of disclosure of the documents. Furthermore, the recognized basis for classification of this information—that the government's interest in particular types or channels of communications would be revealed by their disclosure—is not dependent on the notion set forth in the *Baez* affidavit or the government's brief that foreign targets probably do not bother to encrypt their messages because they are aware of NSA's inability to intercept more than a small percentage of all communications. Even if they are not so aware of the limitations on NSA's capabilities, the national security would be injured by revealing which communications have been targeted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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